In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THOMAS E. KEPNER, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 244.

FRED L. DORR AND EDWARD F. O'BRIEN, plaintiffs in error, v. THE UNITED STATES. } No. 583.

SECUNDINO MENDEZONA Y MENDEZONA, plaintiff in erorr, v. THE UNITED STATES. } No. 584.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF OF THE SOLICITOR-GENERAL FOR THE UNITED STATES.

THE FACTS.

No. 244.

Kepner, an attorney at law, was charged with the crime of swindling or embezzlement (*estafa*) under the criminal code in force in the Philippine Islands,[a] by appropriating to his own use the money of a client. He was tried by one of the judges of the supreme court

[a] Section 2, articles 534, 535, paragraphs 1, 5, see Appendix, p. 1.

of the islands, sitting as judge of the court of first instance, without a jury, and was acquitted on the ground that there was sufficient evidence of a bona fide claim of right to raise a reasonable doubt as to the existence of fraudulent intent. The Government appealed; motions to dismiss on the ground that the prosecution was not entitled to an appeal were denied, the court holding (Rec., p. 7) that there is no finality to the judgment of the trial court in criminal cases in the Philippines until it has been ratified by the court of last resort, and that jeopardy being the peril not of more than one trial, but of more than one punishment, there can be no danger of a second punishment until the first has been finally adjudged. On the merits, after exhaustive review of the evidence, the court declared (Rec., pp. 11–18) that Kepner was unworthy of credence and of his honorable profession; found that he sought to take a grossly unfair advantage of a confidential relation, reversed the court of first instance, adjudged the defendant guilty, and sentenced him to imprisonment, with the forfeiture of the right of suffrage and of eligibility to office, etc., in accordance with the code.

No. 583.

Dorr and O'Brien, the publisher and proprietor and the editor, respectively, of the "Manila Freedom," were accused of publishing a willful and malicious libel against Señor Legarda, a member of the Philippine Commission. The circumstances were these: On the prosecution of the editor of another paper, the defense

had offered to prove the truth of the allegations published therein, which were highly scandalous in form and substance. The judge of first instance, it seems (Rec., pp. 9, 35), had excluded the proof, but permitted the document setting forth the libellous matter in detail to be filed in the cause. The report of these proceedings in the "Manila Freedom," copying the document *totidem verbis* under headlines which contained the words "traitor, seducer, and perjurer" as applicable to Commissioner Legarda (pp. 27–29), constitute the cause of action here.

The trial proceeded before the court of first instance, and the defendants demanded a jury trial, which was refused. After demurrer and a motion to dismiss had been overruled, and upon full hearing, the defendants were found guilty and each sentenced to six months' imprisonment at hard labor and a fine of $1,000. They appealed to the supreme court of the islands, which affirmed the judgment below (pp. 34–48), holding that there is no law in the Philippine Islands entitling the defendants to a jury trial; that the caption and headlines of the article in the "Manila Freedom" constituted the offense of libel; and that the judgment is sustained by the evidence. A dissenting opinion (pp. 48–51) took the view that as the article itself was privileged (which seems also to have been assumed in the opinion of the court, but was not conceded by the Government), the headlines did not constitute libel unless there was proof or necessary inference of malice, which did not appear.

No. 584.

Mendezona, like Kepner, was charged with *estafa* or swindling. The case is well epitomized at page 8 of the record. The defendant, representing that he had a certain quantity of hemp in his warehouse, negotiated a credit, and pledged the hemp as security to the creditor. After large payments had been made on account of the loan, it was discovered that the total number of bales of hemp in the warehouse at the time of the pledge was much less than that represented by the defendant, and that part of the hemp so pledged was the property of others or had already been pledged to others. The facts are complicated; they are fully set out in the opinion of the appellate court (Rec., p. 9 *et seq.*). There were numerous banking transactions with different creditors, a mingling and substitution of collateral, showing falsity and fraud, and a final insolvency and settlement of the civil liability, in which creditors joined. A large part of the advances was made before the execution of the instrument of pledge, which, however, covered past and future advances; but fraudulent dealing and criminal liability stand out as a result of all the facts, and the finding of the appellate court is clearly justified.

After various preliminary motions had been determined, there was a plea of not guilty and a trial before the presiding judge of the court of first instance at Manila. That court leaned to the view (Rec., pp. 4–7)

that the pledge was rather a matter of form; that large credits had been obtained by the firm at that time with facility, and that the granting of the credit was not dependent upon the specific pledge of the hemp. The court's conclusion was that the charge had not been proven, and the defendant was acquitted. Upon appeal by the prosecution, the supreme court of the islands found the defendant guilty, and sentenced him to imprisonment with loss of civil rights in accordance with the code. The determination on the law was that the two essential elements of *estafa*, deceit and damage, were present; that a compromise of the civil liability did not end the criminal liability, and (upon the denial of a motion for rehearing, p. 27) that an appeal by the prosecution from a judgment of acquittal does not put a defendant twice in jeopardy.

THE ASSIGNMENTS OF ERROR.

In all three cases the right of trial by jury in criminal prosecutions in the Philippine Islands is involved. In the Kepner and Mendezona cases the question of jeopardy is presented. In the Dorr and O'Brien case there is also an inquiry on the merits as to the law of libel, which will be fully discussed by Mr. Attorney-General Wilfley. The chief points in that inquiry are whether a document presented in court, not by an attorney of record but by a bystander, in the shape of an "offer to prove," setting forth charges against character which it fairly appears were both wanton and untrue, which

were not germane to the issue under existing law, and were not accompained with the production and offer of witnesses, takes on the character of privileged matter, because a court, although apparently excluding proof (Rec., pp. 9, 35), improperly permits the document to be filed in the case; and whether, even if the body of the newspaper article containing the document obtained from the court files be privileged, the headlines epitomizing it were fair and permissible comment free from the imputation of malice. The appendix contains the law of the islands[a] in force at the time the prior libel against Commissioner Legarda was uttered, and the present law,[b] which was enacted previous to the publication now complained of. The chief changes made by the present law were to permit the truth to be shown in evidence, and to provide specifically that the report of judicial proceedings should be privileged matter.

We contend that under that law this publication was not privileged within the established rule and exceptions of our own law regarding the report of judicial proceedings; that truth does not excuse malice, which may be shown, although it is not to be implied from the mere fact of publication; and that the body of this article as well as the headlines betray the malicious character of the publication.

The errors assigned will be found at page 20 of the record in No. 244, page 52 in No. 583, and page 29 in

---

[a] Penal Code, Title X, chapter 2, Appendix, p. 2.
[b] Act No. 277, Philippine Commission, Appendix, p. 3.

No. 584. Those involving the constitutional questions are reducible to these two propositions:

I. That trial by jury in criminal prosecutions in the Philippine Islands is provided and required by the Constitution and laws of the United States.

II. That the prosecution is not entitled to an appeal in a criminal case from a judgment of acquittal by a court of first instance, and that such an appeal puts a defendant twice in jeopardy, and is contrary to the Constitution and laws of the United States.

THE LAWS.

I set forth here the constitutional and statutory provisions upon which the contentions of plaintiffs in error are chiefly based.

Article III, sec. 2, cl. 3 of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

The fifth amendment to the Constitution provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The sixth amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 5 of the Philippine civil government act of July 1, 1902 (32 Stat., 691), contains the following provisions:

> That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.
>
> That no person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

Before discussing the effect of these provisions upon the questions in controversy it will be well to review briefly the state of the law in the Philippines with reference to crimes and the course of criminal procedure.

Besides the specific references to the appendix, various other matters will be found there, not particularly cited, which relate to the inquiry.

The gradual extension of the Spanish law to the Philippines is shown in a historical résumé by Señor Arellano, chief justice of the islands.[a] The judicial organization was constituted with an *audiencia* or supreme court, courts of first instance, and justices of the peace, which still form the system of courts. The ordinary criminal jurisdiction was distributed between these justices and the first instance courts, and in general an appeal lay from the former to the latter and from the latter to the audiencia. The substantial forms of a real trial existed at all periods, having in the court of first instance the "summary" stage of preliminary investigation, and the "plenary" stage of more regular and formal proceedings; and there was developed gradually a systematic law with principles, maxims, and rules of procedure all drawn from the civil law jurisprudence of the Peninsula. The substantive law of crimes was col-

[a] First report of Taft Commission: President's Message of January 5, 1901, page 225. See also introduction to translation of "Compilation of the Organic Provisions of the Administration of Justice in force in the Spanish Colonial Provinces," War Department, 1899; "Development of Law in Spain and Her Colonies," by William Wirt Howe, Albany Law Journal of August 18, 1899, page 101.

lected in the Penal Code,[a] extended to the Philippines by royal decree of September 4, 1884, and royal order of December 17, 1886.[b] The law of jurisdiction and procedure was not codified, but was to be found chiefly in the "*reglamento*" of September 26, 1835, the "*cedula*" of January 30, 1855, the provisional law of criminal procedure which accompanied the Penal Code of 1884, and the compilation of organic provisions for the administration of justice in the Spanish colonies of January 5, 1891.[c] So far as these laws were inconsistent with each other, the latest in date was to govern.

The Spanish law of crimes and procedure was adopted by our authorities in accordance with the practice of civilized nations and the rule of international law, by which the existing civil administration is maintained as far as possible during military occupation, and upon cession of territory the municipal laws continue in force unless superseded or modified by the new sovereign.[d] The language of General

[a] Translation of the Penal Code in force in the Philippines, War Department, 1900.

[b] See page 1017, Volume II, of Alcubilla's Diccionario, in Spanish.

[c] Of these, only the compilation of 1891 has been translated. (See Note *a*.) The Spanish text of the *reglamento* is to be found at page 102, Volume IV, Zamora's Biblioteca; of the cedula at page 804, Volume I, year 1888, Berriz's Diccionario; of the provisional law at page 1182, same volume; of the compilation at page 383, same work, year 1891. See Appendix, page 32.

[d] Instructions of President to general commanding, dated May 28, 1898; proclamation of the latter, dated August 14, 1898. Senate Doc., No. 208, Fifty-sixth Congress, first session, pages 85, 87; Halleck Int. Law, ch. xxxiii, sec. 14 *et seq.*; Vattel, page 388, note; Calvo, t. iv, sections 2478, 2479.

Merritt's proclamation, following the President's instructions, is:

> It is ordered that the municipal laws, such as affect private rights of persons and property, regulate local institutions, and provide for the punishment of crime shall be considered as continuing in force so far as compatible with the performance of military government, and that they be administered through the ordinary tribunals substantially as before occupation, but by officials appointed by the government of occupation.

During occupation and under the military government there were the usual reservations of jurisdiction in the military tribunals, but eventually the previous organization, jurisdiction, and mutual relations of the civil courts under their former designations were substantially restored by General Orders, Nos. 20, 21, and 22, 1899,[a] of the military governor.

The principal changes in the law of crimes and procedure made since the American occupation are contained in the following laws and orders:

General Orders, No. 58, of April 23, 1900,[b] a comprehensive code of criminal procedure, retaining the fundamental features of the Spanish system, but making various modifications and additions, including the introduction of the writ of habeas corpus.

Act No. 136 of the Philippine Commission, June

---

[a] See Appendix, p. 33.

[b] See Appendix, p. 6. These orders, as subsequently amended, are still in force. Public Laws, Philippine Commission, Vol. I, pp. 1079, 1082. See also Philippine act No. 194.

11, 1901,[a] reorganizing the courts, defining their jurisdiction, and conferring upon them power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto, and habeas corpus.

Act No. 190 of the Commission, August 7, 1901, a code of civil and special procedure, containing rules for proceedings in habeas corpus.

Act No. 194 of the Commission, August 10, 1901, making a slight change in the relations of the courts of first instance to the supreme court in criminal cases.

Organic act of the Philippines, passed by Congress July 1, 1902, ratifying the previous executive action and exercise of the powers of government, recognizing the authority of the Philippine Commission to enact laws,[b] and expressly providing that section 1891, Revised Statutes, extending the Constitution and the laws of the United States, not locally inapplicable, to organized Territories, should not apply to the Philippines. This law also confirmed the creation and jurisdiction of the supreme court and courts of first instance and municipal or justices' courts of the Philippine Islands as theretofore provided, subject to the power of the island government to confer additional jurisdiction and to change the practice and method of procedure, and provided for appeal from the supreme court of the islands to this court.

An examination of the enactments above mentioned

---

[a] See Appendix, p. 8.

[b] See also "Spooner resolution" of March 2, 1901. (31 Stat., 910.) Appendix, p. 11. Theretofore the authority of the Philippine government rested on the war power of the President.

will show that, while the local body of laws has been enlarged and modified, the Spanish law still constitutes the underlying substantive code and rule of procedure for the islands.

The report of the Philippine Commission for 1901, part 1, discussed the administration of justice (p. 73), explained the law for the reorganization of the courts (p. 76), and commented upon the judicial system (p. 82), stating the need for certain reforms especially in the interest of speedy procedure. In referring to the preparation of a new criminal code and a new code of criminal procedure (pp. 90–91)—which, however, have not yet been completed and adopted—the report uses the following language:

> The criminal code, unlike the code of civil procedure, is based largely upon the existing Spanish system, and only makes such changes as are deemed necessary to fit it to modern views of criminal law and to the new political relations of the people of the islands. * * * General Orders, No. 58, issued by the military governor on April 23, 1900, contains the outline of a code of criminal procedure greatly simplifying the original Spanish procedure and furnishing much needed relief temporarily; so that the work of perfecting the new code of criminal procedure is not of such pressing necessity as otherwise would be the case.

It becomes necessary, therefore, to ascertain the state of Spanish law upon the subjects of right of trial by jury, the course and right of appeal in criminal

cases, and the principle of jeopardy; and then to consider the specific modifications which have been made in that law by the orders and acts of the military and civil governments of the archipelago and by the legislation of Congress since the American occupation.

TRIAL BY JURY.

Jury trial, although foreign to civil law procedure, was introduced into France by the Code Napoleon,[a] and into Peninsular Spain by royal decree of December 22, 1872. The provisions of this decree relating to the jury were suspended, however, in 1875, and trial by jury was not restored in Spain until 1888.[b]

Neither the decree of 1872 nor the law of 1888 applied to the Philippines, and the jury system was unknown in those islands at the time of the American occupation. The laws of procedure continued to provide, as formerly, that the judges should hear all criminal causes, receive and consider the evidence, determine the guilt or innocence of the accused, fix the penalty to be imposed, and pronounce judgment.[c]

The American government in the islands has not seen fit to introduce the jury system, and Congress in the organic act omitted from the bill of rights contained therein the constitutional guaranties of indictment by a grand jury and trial by a petit jury.

---

[a] Stephen's History of Criminal Law of England, Vol. I, p. 517; Code d'instruction criminelle, Liv. II, Tit. II.

[b] R. D. Dec. 22, 1872, Alcubilla, Vol. V, p. 44; D. Jan. 3, 1875, ibid., p. 48; Ley Apr. 20, 1888, ibid., p. 188.

[c] See Reglamento, 1835, arts. 51, 58; Cedula, 1855, arts. 20, 51; Provisional Law, arts. 49–52.

COURSE OF APPEAL.

Chief Justice Arellano says in his résumé, already cited, under the head of "recourses" or appeals:

> *Recourses.*—Three instances were recognized as a general rule since the most ancient times for crimes: The first ending with a judgment which, if referring to public crimes, *had either to be reviewed or could be appealed;* the second, which ended with a judgment rendered in open court (*vista*) by the *audiencias*, and against which a prayer (*suplica*) could be filed; the third, when proper, which ended in another chamber of the *audiencia* with a judgment of review (*revista*), and said sentence was definitive and carried with it a writ of execution. Since the penal code went into force [that is, under Spanish sovereignty] the third instance has been abolished, and when the recourse established by it was proper, now the recourse of "cassation" (annulment of sentence) to the supreme court of Spain took place.

The Reglamento of 1835 provides (art. 36) that judges of first instance shall have jurisdiction to hear in first instance all ordinary criminal causes arising in their respective districts; that (art. 51) said judges shall conduct such causes through the "summary" and "plenary" stages to judgment upon the merits, unless the proceedings be sooner quashed; that all orders of quashal and all judgments, whether an appeal be taken from them or not, in cases of crimes for which the law prescribes a corporal penalty, shall be reported to the superior court or *audiencia* for revi-

sion (the entire record, including a transcript of all the evidence, being sent up); that *either party* may appeal from judgments in cases of lesser crimes, in which event the record shall be sent to the *audiencia* in the same manner as aforesaid, but if no appeal be taken the judgment shall be considered final and carried into effect immediately; that (chapter 4) the *audiencia* shall hear all cases sent up for revision and all cases appealed, the parties being cited to be present, and after such hearing shall pronounce judgment; that, if the judgment below and the judgment in second instance differ in any particular, a third hearing may be had, the judgment in which shall be final. No provision is made for a resort to the supreme court at Madrid, except that the judges of the *audiencia* may obtain advice from said supreme court in cases of doubt upon questions of law.

The cedula of 1855 makes no material change in these respects. It repeats (art. 51) the provision that *audiencias* shall have jurisdiction to hear in second instance all criminal cases sent up for revision or on appeal, and (art. 58) continues the right of a third hearing upon petition. It provides specifically (art. 166) for the interposition of appeals in criminal cases by prosecuting officers.

The provisional law of 1884–1886 is silent as to the relations of the court of first instance with the audiencia (except in the case of orders of commitment, "*autos de prision*"), but makes an important change in the criminal proceedings by abolishing (art. 53) the right

of a third hearing and substituting in its place an appeal in cassation on matter of law, which might be taken by the prosecution, as well as by the defense (art. 63), to the supreme court at Madrid.

The Compilation of 1891 relates chiefly to the personnel of the courts. Chapter XI, entitled "Unity and Dependence of the Department of Public Prosecution," sets forth the subordination of lower prosecuting officers to their superiors, and prescribes that every *fiscal* or prosecuting attorney shall, among other things (art. 458, par. 5), "enter in the proper time and form, when not instructed to the contrary, appeals proper in matters in which he takes part, without prejudice to what his superior may decide as to their prosecution."

It is clear from this review of the law—and we know it to be true as a matter of fact—that at the time of the American occupation all cases of serious crimes, whether resulting in conviction or acquittal, went up from the court of first instance to the *audiencia* by transmission of the entire record, including a transcript of the evidence; that in cases of lesser crimes the same result could be obtained by either party by means of an appeal; that the *audiencia* reviewed the entire case, in matter of fact as well as of law, and pronounced judgment; and that an appeal in cassation lay to the supreme court at Madrid, and was available to either party. The latter appeal was necessarily cut off by the transfer of sovereignty to the United States.

The changes made by American legislation are as follows:

General Orders, No. 58, prescribe a course of procedure in courts of first instance somewhat simpler than, but differing in no essential particular from, the Spanish procedure; provide (sec. 32) that all the oral testimony shall be reduced to writing and signed by the witnesses; that (sec. 43) in all cases of final judgments and in all cases formerly provided for by law an appeal shall lie from courts of first instance to the supreme court (*audiencia*) of the islands; that (sec. 44) *either party* may take such appeal, and that the United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint and from an order dismissing an information or complaint; and that (sec. 50) it shall not be necessary, unless an appeal be taken, to forward to the supreme court the record of any case in which there shall have been an acquittal or in which the sentence imposed shall not exceed confinement in prison for one year or a fine of 250 pesos, but that all other cases shall be sent to the supreme court and thereafter take the same course as already provided by law.

Act No. 194 of the Philippine Commission amends section 50 of General Orders, No. 58, and provides that unless there be an appeal the record shall not be sent up to the supreme court, except in cases where the accused is found guilty and the penalty of death is imposed.

The organic act of July 1, 1902, makes no specific change in criminal proceedings, except the one already

noted above in providing for a writ of error from this court to the supreme court of the Philippines.

It appears, therefore, that at the present time the right of the prosecution to appeal from final judgments of courts of first instance to the supreme court of the islands exists in every case, the supreme court having jurisdiction to review the facts and the law, and to pronounce final judgment; that there is a review of the record in the supreme court, without an appeal being taken, in the single case of conviction of a capital crime, that the right of appeal by the prosecution existed under the Spanish law at the time of the American occupation, not only from the court of first instance to the *audiencia*, but also from the *audiencia*, in cassation, to the supreme court at Madrid; and that, under Spanish law, not only capital cases resulting in conviction went up to the *audiencia* as of course, but likewise all other cases of serious crimes, whether resulting in conviction or acquittal.

JEOPARDY.

The doctrine that a man shall not be twice put in jeopardy for the same offense is well known in the civil law. Under the caption, "*Non bis in idem*" in Bouvier's Dictionary, it is said:

> *Non bis in idem.* In the civil law. A phrase which signifies that no one shall be twice tried for the same offense, that is that when a party accused has been once tried by a tribunal *in the last resort* and there convicted or acquitted, he shall not again be tried.

In Merlin's "Repertoire," to which Bouvier refers, it is said (Vol. XI, p. 528):

> *Non bis in idem*, a maxim of law, or rather of practice, the meaning of which is that an accused who has been adjudged, condemned, or acquitted by an *arrêt* or other judgment rendered *in last resort*, or which has acquired the force of *chose jugée*, can not be again prosecuted by reason of the same act.

Merlin and Bouvier cite the following provision of the Code of Justinian, which is also referred to by the court of cassation of France as the basis of the doctrine of jeopardy.[a]

> He who has been accused of a crime can not be complained of for the same offense by another person. But if more than one offense arise from the same act and the offender has been accused of one offense, it is not prohibited that complaint be made against him by another person for the other offense.
>
> Cod., lib. ix, tit. ii, l. 9.

This principle continued to be recognized in French law, was made a part of the constitution of 1791, of the constitution of the year III, of the code of 3 Brumaire, year IV, and, finally, of the Napoleonic "*code d'instruction criminelle*," which declares:

> Art. 360. No person legally acquitted can be a second time arrested or accused by reason of the same act.

---

[a] See Devilleneuve and Gilbert's *Table générale alphabétique du Recueil général des lois et des arrêts*, vol. 3, p. 399.

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255) and the Siete Partidas (A. D. 1263).

> After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases).
>
> Fuero Real, lib. iv, tit. xxi, 1. 13.
>
> If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of that offense (except in certain cases).
>
> Siete Partidas, Part. VII, tit. i, l. xii.

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola, in 1848, it is said, in considering the persons who may be accused of crime:

> It is another of the general exceptions that a person can not be accused who has formerly been accused and adjudged of the same crime; since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law.
>
> Tomo I, pag. 511.

The identity of the law of jeopardy in the Roman, French, and Spanish systems is thus manifest. The thing forbidden in each system is the second *accusation* of a person for an offense of which he has already been acquitted. An appeal by the State being by no possible construction a second accusation, it followed that such an appeal was not a second putting in jeop-

ardy, and we find, therefore, that the law in Spain and France [a] permitted such appeal by the State.

The only specific legislation that has been had upon the subject of jeopardy in the Philippines since the American occupation is the provision of the organic act above set forth.

ARGUMENT.

I.

The provisions of the Constitution respecting trial by jury do not apply to the Philippine Islands.

The Insular Cases in general laid down these propositions: That the power to acquire territory involves the power to govern and dispose of it; that Congress, in legislating for newly acquired territory, possesses plenary power, and is not restrained from the widest latitude of discretion, although there are inherent and fundamental limitations which are not to be transcended; that not every clause of the Constitution attaches to the Territories as well as the States, and there is a clear distinction between such prohibitions as go to the very root of the power of Congress at all and such as are operative throughout the United States; that besides the express limitations which are applicable, there may be fundamental restrictions which can not be transgressed although not expressed. The declarations in the Mormon Church case were cited

[a] The provisions of law allowing such appeal in the Philippines have already been cited. In the Peninsula and in France, where trial is by jury and in single instance, an appeal in cassation is allowed to the State as well as to the accused. See Code d'inst. crim., arts. 202, 206, 373; Ley, Apr. 20, 1888, art. 118.

among other authorities in support of these propositions, and as to the nature of such fundamental and universal restrictions the opinions of the majority of the court said:

> Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed" and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the first amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peacefully assemble and to petition the Government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application. * * * We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free

> access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage [citing *Minor* v. *Happersett*, 21 Wall., 162], and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals. (Per Mr. Justice Brown in *Downes* v. *Bidwell*, 182 U. S., 277, 282–283.)
>
> Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the Government all power on a given subject that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character can not be under any circumstances transcended, because of the complete absence of power. (Per Mr. Justice White, id., 294–295.)

Earlier authorities discussing the extent to which former laws are necessarily displaced upon a transfer

of sovereignty to this country because of our constitutional principles and institutions indicated the same inquiry, but laid down no precise rule. (*Railroad Co.* v. *McGlinn*, 114 U. S., 542; Halleck's Int. Law, 1st ed., c. 33, sec. 14.)

The question, then, is whether the express limitations respecting trial by jury apply of their own force in the Philippines as a vital and inherent principle of our free government everywhere and at all times, or whether they constitute simply a remedial right and a particular method of procedure peculiar to our Anglo-Saxon jurisprudence, but not essential to the protection of individual liberty.

We think this question was answered in the Mankichi case. The Hawaiian government and jurisprudence were founded upon the common law and our own ideas and principles. The act of annexation continued in force only those existing laws which were not contrary to the Constitution, and yet the law materially modifying the common-law rules respecting trial by jury was held to be in force until Congress explicitly extended the Constitution and provided our own system of grand and petit juries. The court advanced a step further in defining what rules and principles do necessarily restrict our government of Territories, and said (*Hawaii* v. *Mankichi*, 190 U. S., 197, 217–218):

> It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they

> would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without due process, or confiscating private property for public use without compensation, remain in force after the annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.

It thus seems clear that while most of the privileges and immunities of the Bill of Rights apply to territories from the moment of acquisition, trial by jury does not.

This institution is not a necessary and fundamental right, but concerns procedure mainly, and the guarantee does not apply to newly acquired territory. The necessary deduction from that case is that if there is a substantial modification of the jury system, or no jury system at all, but some other adequate system of trial in due and regular course, which is long established and suited to the needs of the inhabitants, that is sufficient, and those particular constitutional provisions do not apply until Congress sees fit to put them in force. Such a system is due process of law, and that idea is recognized by the bill of rights in the act of 1902, which substitutes for the grand jury guarantee the provision "that no person shall be held to answer for a criminal offense without due process of law."

That is, of course, just this case. There is no trial by jury at all; that mode was entirely unknown to the civil law in general and as administered in the Philippines, just as accusation by grand jury is unknown. But the time-honored method of trial in the civil law has been always in vogue, is familiar to the people, and is perfectly adequate to all the demands of justice. Whatever might be said of the remote past, when all judicial systems and officers were too much under the control of absolute power; or whatever might be said of imperfections in modern administration at the hands of this or that nation, it is idle to say that under the full safeguards for the rights of the defense which we have imposed upon our government in the Philippines, the civil law, with its mode of accusation upon formal

complaint, trial before a judge alone, and in an established course of review, does not furnish an adequate, effective, and just system.

It is not necessary for me to dwell on the *claims* of the locality to its own system, "venerable by time and custom," to borrow the phrase of Mr. Justice Matthews, describing the institutions upon which our Constitution and laws were founded. (*Hurtado* v. *California*, 110 U. S., 516, 521.) If our mode of trial does not exclusively embody the "principles of public liberty and private right, which lie at the foundation of all free government" (*ib.*), to which our Government *must* be consistent everywhere, then to introduce the jury system instantly might well be to confer a blessing of doubtful wisdom and beneficence upon an unwilling people. "While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation." (*Holden* v. *Hardy*, 169 U. S., 366, 387.)

All these ideas—the respect which we are bound to feel for the institutions of the civil law, the realization that we do not possess a monopoly of wisdom and justice, the rights of new peoples coming under our sovereignty not to be unnecessarily interfered with in respect to their historical institutions and jurisprudence—have been luminously expressed by the court in opinions of great ability and force.

In the *Hurtado* case the court said (110 U. S., 529, 530, 531):

> But to hold that such a characteristic is essential to due process of law would be to deny

every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. * * * It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. * * *

And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideals and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation

> and system will mold and shape it into new and not less useful forms.

In *Holden* v. *Hardy* (169 U. S., 366, 389) the Court said:

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

Nor is it necessary to dwell upon the inconveniences and mischiefs which would result from the opposite view. The court took such considerations into account in the Mankichi case. Here the mischiefs would be even greater; they would be revolutionary. It is impossible for the mind to conceive the instant introduction and working of the jury system in the Philippines, with its heterogeneous population bred to a different method and containing many primitive tribes inhabiting remote and unsettled districts.

I need not review at length the other cases involving trial by jury which the court has adjudged. In the Insular Cases these authorities were analyzed and distinguished or reconciled, and the doctrines to be

deduced from them were thus summarized in the Mankichi case (190 U. S., pp. 211, 220):

> The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized territories (*Webster* v. *Reid*, 11 How., 437; *American Pub. Co.* v. *Fisher*, 166 U. S., 46; *Thompson* v. *Utah*, 170 U. S., 343), though we have also held that the States, when once admitted as such, may dispense with grand juries (*Hurtado* v. *California*, 110 U. S., 516), and perhaps also allow verdicts to be rendered by less than a unanimous vote. (*American Pub. Co.* v. *Fisher*, 166 U. S., 46; *Thompson* v. *Utah*, 170 U. S., 343.) [Per Mr. Justice Brown.]
>
> * * * * *
>
> The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. (*Hurtado* v. *California*, 110 U. S., 516; *Ross's case*, 140 U. S., 473; *Bolln* v. *Nebraska*, 176 U. S., 83, and cases cited on page 86; *Maxwell* v. *Dow*, 176 U. S., 584, and *Downes* v. *Bidwell*, *supra*.) [Per Mr. Justice White.]

Taking them all together, the previous cases establish these propositions: That the first eight amend-

ments operate as restraints upon Congress and the National Government and not upon the States; that, accordingly, while trial by jury, whether in civil or criminal cases, is a necessary rule in the courts of the United States, and this rule applies to the District of Columbia and the organized Territories to which the Constitution and laws of the United States have been extended, nevertheless the States are not restrained by these constitutional limitations and may provide for other modes of accusation and trial consistently with due process of law and the principles of free government. The Mankichi case and the present cases add another category, viz, of territory not organized within the rule.

The power of Congress here is plenary. Congress has exercised it by maintaining all the guarantees, vital and necessary to free government, which our war power had imposed upon itself at the outset. Congress is doubtless subject to any similar restraint, though unexpressed, which is inherent and essential in the principles of public liberty and private right, but Congress has not only not extended the Constitution and laws in general of the United States, but has affirmatively withheld them, and intentionally has not included trial by jury in the bill of rights conferred. Under these circumstances and under the decisions as interpreted and applied by the Insular cases, the logic is certain and inevitable that the right of trial by jury does not apply to the Philippine Islands.

The most recent authorities on the subject of procedure by grand and petit juries in the States are *Bolln*

v. *Nebraska* (176 U. S., 83), and *Maxwell* v. *Dow* (id., 581). In these cases the previous decisions are reviewed and affirmed, and the court fully sustains the right of the people of a State to determine for themselves the proper method of accusation and trial of crimes unrestrained by the provisions of the Constitution of the United States on the subject. "Trial by jury has never been affirmed to be a necessary requisite of due process of law." "It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion that they are much better judges of what they ought to have in these respects than anyone else can be." (*Maxwell* v. *Dow*, pp. 603, 604.) It is in reason equally just and proper that an inherited and approved mode of trial should be preserved to a locality coming under our territorial government. The presumption is natural and necessary that the inhabitants of such a new territory prefer the accustomed mode of their jurisprudence. It will be time enough to consider a change when, as is proposed for the near future, they are enabled to express a choice upon this and other subjects through a representative assembly. In the meantime their development and training in our principles and methods in order to fit them for such choice should proceed as far as possible through their own established forms of civil institutions. There ought not to be great disturbances and violent changes, and if the right to retain inherited modes and forms is as natural and as consonant with reason and principle as the right of the people of a

State of the Union freely to adopt their own methods, the court has closed the logical circle by the recent determinations that not all the provisions of the Constitution apply to such territories, and that our jury mode of accusation and trial is not a fundamental limitation therein.

It seems certain from previous adjudications that inherent principles of individual liberty and free government are fully observed if there is "a forensic trial under a broad and general law operating equally upon every member of [the] community;" or, to quote a well-known paraphrase of the clause from Magna Charta, "*nisi per legale judicium*," etc., "but by the judgment of his peers, *or by some other legal process or proceeding adapted by the law to the nature of the case.*" (See citations in *Hurtado case*, 110 U. S., 526, 527.)

The Philippine mode is within the idea contained in Mr. Webster's definition of law, and constitutes "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

II.

An appeal in a criminal case from a judgment of acquittal by a court of first instance in the Philippine Islands is valid, and such an appeal does not put a defendant twice in jeopardy contrary to the Constitution and laws of the United States.

The question under the Constitution is merged in the question under the act. The inquiry is, What does the provision mean as applied to Philippine conditions; what was the intention of Congress? The

principle is ancient and inherent in all just laws as part of the universal law of reason and conscience, and manifestly in some sense is a fundamental limitation on our Government everywhere.

It is unnecessary to cite authorities for the conceded proposition that in our jurisprudence the rule forbids in general a second trial as well as second punishment, and denies an appeal to the State unless by positive enactment such right of review on questions of law is conferred.

The rules and the qualifications are stated in *Ex parte Lange* (18 Wall., 163), *United States* v. *Sanges* (144 U. S., 310), *United States* v. *Gibert* (2 Sumn., 19), by the text-books on constitutional and criminal law, and in numerous other authorities therein cited.

It is equally evident, however, that the scope and effect of our rules are essentially dependent upon the peculiar function and conclusive authority of a jury. The finality of a verdict against the prosecution rules the whole subject.

In one of the State cases where an appeal on questions of law was allowed to the prosecution under the State statute (*State* v. *Lee*, 65 Conn., 265, 272), the court said:

> The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential, but not more essential than the principle of justice. A final settlement is not more vital than a right settlement.

It was held that the maxim on jeopardy—

> is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the State deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure; while such prosecution remains undetermined the one jeopardy has not been exhausted. * * * The rule as formulated by this court in *State* v. *Garvey* [42 Conn., 233] rests upon solid foundations. "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

These passages bring us to the theory of the Philippines law. All laws forbid a second punishment, and there is of course no such danger here. The Roman law, like our own, forbids a second trial, but in that law the rule operates after trial by the tribunal of last resort and conviction or acquittal there. This is the finality which is "the most essential effect of judicial decisions."

In other statements of the doctrine the thing forbidden is a second accusation. An appeal by the State

22585

can not be regarded by any possible construction as either a new trial or new accusation, and therefore is not a second putting in jeopardy. This is undoubtedly the view in France and Spain, where such appeal is and apparently always has been allowed. The trial is a continuous and unitary thing until the review is completed. In both countries in recent years there has been a limited use of trial by jury, but an appeal in that case also is allowed to the State as well as the accused. This use of the jury is confined to the Peninsula and was never extended to the colonial possessions of Spain. The authority of a jury's verdict is the controlling factor in our conception of finality, in contrast with the rules of Spanish jurisprudence.

It is certain that under the system we found in the Philippines the view of jeopardy was as I have stated; all serious crimes were necessarily reviewed by the *audiencia*, whether acquittal or conviction resulted below, and in lesser crimes either party had the right of appeal. The entire case was reviewed upon a complete transcript as to matters of fact as well as law, and the case was not final, the trial ended, and the jeopardy complete until the *audiencia* had pronounced judgment. Then, in the Spanish law, as much as in our own, the principle supervened and forbade additional punishment, second trial, or new accusation for the same offense. The American legislation has made no substantial changes in these rules and proceedings. Such changes as have been made are in favor of the accused. Acquittal of a serious crime is not now nec-

essarily reviewed as before, but only in case the prosecution elects to appeal.

The entire policy of our Government has properly been to regard and preserve the local institutions as far as possible. Congress has recognized and sustained this policy. We have prescribed a bill of rights; we have imported our great remedial writs, and we have carefully laid down the full rights of defense in the existing law of criminal procedure. It was noted in the Hurtado case that the State under its statute "carefully considers and guards the substantial interests of the prisoner;" and the court seems to have looked upon this as an additional reason for not disturbing the method of accusation adopted by the State, being due process.

Here a State has not adopted a different system or methods, but we found them immemorially established in a territory of diverse traditions from our own.

We have thus recognized and maintained existing institutions and simply adjusted to them those rights and benefits of our laws which were deemed to be appropriate to the local conditions and essential. The act of Congress manifests no intention to displace the foundations and framework of that civil life, but on the contrary manifests a clear intention to approve and sustain the established scheme as modified and enlarged under our authority. There are many evidences of this throughout the act of 1902. For instance, in this very matter the prohibition of the act is of a second "jeopardy of punishment," differing from the lan-

guage of the Constitution. I do not argue, of course, that the only thing forbidden is a second punishment, for the prohibition of second trial is because then there would be the hazard, the danger of a second punishment; the risk would be run a second time. Nevertheless, those words, stripped of English and American interpretation, and literally construed permit the review of a judgment of acquittal. The variation from the language of the Constitution may well have been with a purpose of recognizing the peculiar Philippine theory of trial and course of appeal and of adjusting our doctrine of jeopardy to them. This conception indeed appears in the view of the court below, where they declare that the act of Congress is consistent with the Philippine law, and say (Kepner record, p. 10):

> To be in jeopardy in the legal sense it is not sufficient that the danger should have begun. It must also have ended before the plea can be made effectual. Jeopardy is not the peril of more than one trial, but the peril of more than one punishment, and in the same proceeding there can be no danger of a *second* punishment until the first has been *finally* adjudged.

But this is the same as to say that here there has *not* been more than one trial, and that contention I wish to emphasize and enforce as the true theory of the matter. The original trial is a unitary and continuous thing, and is not complete until the appellate court has pronounced judgment.

We do not rest merely on the usual and necessary presumption that Congress was aware of the situation and legislated with full knowledge of all the facts. The history of our Government in the islands from the beginning, the nature of the local laws and institutions, the continuation and modification of them, the reorganization of the municipal government and of the courts in the form which our authorities found and preserved—all these things and the entire series of transactions and developments have been spread before Congress in numberless reports and Philippine enactments, through investigations, and by public documents. Congress studied the Philippine situation with particular care and great deliberation, and acted upon full information. It is incredible that Congress meant to impose the pecular conception and effect of the rule on jeopardy which is embedded in our law simply because of its relation to trial by jury. The principles are essentially connected here, and neither the one nor the other has any place in the Philippine Islands. Obeying the rule, as we have done, in its inherent meaning and fundamental scope, and observing its due force and effect as a recognized part of Spanish law and the Philippine system, we interpret the act of Congress according to its true meaning and purpose. It is manifest that, if the contrary view is sustained, mischiefs and confusion would follow like those which would be consequent upon the immediate introduction of grand and petit juries. The same reasons are apparent for a construction which will

avoid if possible absurd or mischievous or unreasonable results as were found in the Mankichi case.

It is certain that Congress did not intend by the jeopardy clause to introduce trial by jury. The way to that was open and easy, but Congress intentionally failed to take it. It is equally and consequently certain, I think, that Congress did not intend by that clause to repeal the Philippine laws by inference and abolish this essential part of that scheme, intimately entwined as it is with their historic body of criminal jurisprudence. The single question is, Did Congress intend, with the jeopardy clause, to wipe out by mere remote implication the entire established course of State appeals in criminal cases? I do not believe it is possible to maintain this view. Congress never meant to declare in this way, or in any other way thus far, that although trial by jury was definitely withheld, and although judgments in first instance were only interlocutory in Philippine law, nevertheless the finding of acquittal by the single judge of first instance should be final and irrevocable.

It will be evident to the court, I believe, on comparison of the views of the lower court in the Kepner and Mendezona cases with the careful weighing and exhaustive analysis by the appellate court *in banc*, that this result would be unfortunate, and would often defeat, rather than secure, justice. The verdict of a jury not being involved, I do not believe that any candid mind could maintain that such deliberate review by the entire bench of the supreme tribunal will not serve

the ends of justice and constitute a proper and sufficient safeguard to the individual, as well as protection to the community. Looking at the matter dispassionately, and free from predilection, is it not reasonable that the concurrence of all or a majority of the supreme judges will be more likely to reach the correct and just result than the unchallenged conclusion of one inferior judge?

Preeminently the construction of the act should keep in view the maxim *ut res magis valeat quam pereat.* If Congress had desired and intended to give to our government in the Philippines the mandate to strike down appeals by the prosecution in criminal cases, they would have done so in clear and unmistakable language. They knew exactly what had been done in this matter—what the old law was, and that it had been continued in force. It is certain that the law-abiding people of the Philippines are attached by sentiments of reverence as well as by the natural prejudices of custom and tradition to their ancient jurisprudence. I can say nothing in favor of its maintenance half so forcible and convincing as the passages from the learned opinions in *Hurtado* v. *California* and *Holden* v. *Hardy* which I have already quoted. These considerations constitute a claim which I respectfully submit should be carefully regarded. We ought not to dispossess the Philippine people of their own. We found these institutions established and adequate to the judicial side of orderly civilized government. The manifest failures of Spain were not in this field. There is due process

within our own fundamental guarantees and by our own tests. The system is sufficient for the full demands of distributive justice. The law is equal and operates upon all alike. It is as right for this Government to preserve the essential character of the structure as a possession and cherished institution of the inhabitants as it is for a State to adopt just such institutions (and the court has said a State may do so, per Mr. Justice Bradley in *Missouri* v. *Lewis*, 101 U. S., 22, 31) upon the desires and demands of its people.

The *Ross* case (140 U. S., 453, 464) says that we need not take a jury to a foreign country to try a citizen who has committed a crime; nor do we need to take a jury and the accompanying train of doctrines to this territory of the United States for that purpose. Especially in that territory, where we are peculiarly bound to show, and are professing and endeavoring to show, the highest standards of public and private conduct, citizens of the United States who choose to misconduct themselves and dishonor their country, as well as other residents, alien and native alike, may well be left to the law and the courts before which their deeds bring them. Justice and the public interest have rights as well as the defense—for the rights of which, indeed, we have amply provided. If the procedure is novel to our ideas, and the punishment under it may be severe, that is a matter to look to before one goes to the Philippines or commits a crime there. A system should not be overthrown for any such reasons, or unless it is plainly inconsistent with public liberty and individual right.

I submit that this is not so; that the Philippine laws respecting criminal trials and appeals are entirely harmonious with the necessary principles of free government, and that all the proceedings taken herein were due and legal and were not forbidden by the Constitution and laws of the United States.

HENRY M. HOYT,
Solicitor-General.

O

APPENDIX.

(A) Extracts from the Penal Code in force in the Philippines.

Title XIII.

Chapter IV. Section II. *Swindles and other false pretenses.*

Article 534. A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

1. With the penalty of *arresto mayor* in its minimum and medium degrees if the fraud should not exceed 250 pesetas in amount.

2. With that of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.

3. With that of *presidio correccional* in its minimum and medium degrees if it should exceed 6,250 pesetas.

Article 535. The following shall incur the penalties of the preceding articles:

1. He who shall defraud others by using a fictitious name, by assuming fictitious power, influence, or attributes, or by pretending to possess imaginary property, credit, commission, enterprises, or business, or by using any other similar deceit that is not one of those mentioned in the following cases.

* * * * *

26706—04——1

5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

The penalties shall be imposed in their maximum degree in case of deposits made under stress or necessity.

(B) Extracts from the prior law as to libel.

Title X.

Chapter II. *Contumely.*

Article 456. Contumely includes every expression pronounced, or action executed, with a view to dishonoring or holding up to contempt another person.

Article 457. The following are grave acts of contumely:

1. The imputation of a crime of those subject to prosecution at the instance of the Government (*de officio*).

2. That of a vice or a lack of morality, the consequences of which might considerably damage the fame, credit, or interest of the person offended.

3. Acts of contumely which by their nature, occasion, or circumstance, are ignominious in public opinion.

4. Those which reasonably deserve the classification of grave, in view of the condition, dignity, and personal circumstances of the offended party and the offender.

* * * * *

Article 460. A person charged with acts of contumely shall not be allowed to furnish evidence tending to

prove the truth of his imputations, unless they shall have been directed at public officers about matters concerning the performance of their duties.

In such case the defendant shall be acquitted if he prove the truth of his imputations.

(C) The present Philippine libel law.

[No. 277.]

AN ACT defining the law of libel and threats to publish a libel, making libel and threats to publish a libel misdemeanors, giving a right of civil action therefor, and making obscene or indecent publications misdemeanors.

By authority of the President of the United States, be it enacted by the United States Philippine Commission that:

SECTION 1. A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue or reputation, or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule.

* * * * *

SEC. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defense, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends.

* * * * *

SEC. 6. Every author, editor, or proprietor of any book, newspaper, or serial publication is chargeable

with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same.

SEC. 7. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

* * * * *

Enacted, October 24, 1901.

(D) President McKinley's instructions to the Philippine Commission, of April 7, 1900.

The instructions to the Philippine Commission, through the Secretary of War, contained the following provisions:

"Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this Commission, to be thereafter exercised by them in the place and stead of the military governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for * * * the organization and es-

tablishment of courts. * * * Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

The Executive Order of June 21, 1901, directed that:

"On and after the 4th day of July, 1901, until it shall be otherwise ordered, the president of the Philippine Commission will exercise the executive authority

in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the military governor of the Philippines, and to that end the Hon. William H. Taft, president of the said Commission, is hereby appointed civil governor of the Philippine Islands. Such executive authority will be exercised under, and in conformity to, the instructions to the Philippine Commissioners, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States."

(E) General Orders, No. 58, of 1900.

General Orders, No. 58. Manila, P. I., April 23, 1900.

In the interests of justice and to safeguard the civil liberties of the inhabitants of these islands, the criminal code of procedure now in force therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:

* * * * *

SEC. 3. All public offences triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

* * * * *

Rights of accused at the trial.

SEC. 15. In all criminal prosecutions the defendant shall be entitled:

1. To appear and defend in person and by counsel at every stage of the proceedings.

2. To be informed of the nature and cause of the accusation.

3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or

refusal to be a witness shall not in any manner prejudice or be used against him.

4. To be exempt from testifying against himself.

5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the accused or his counsel, the defense having had an opportunity to cross-examine the witness, the deposition of the latter may be read, upon satisfactory proof to the court that he is dead or insane, or can not with due diligence be found in the islands.

6. To have compulsory process issue for obtaining witnesses in his own favor.

7. To have a speedy and public trial.

8. To have the right of appeal in all cases.

* * * * *

SEC. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court as hereinafter prescribed. * * *

SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

* * * * *

SEC. 50. It shall not be necessary to forward to the supreme court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos,

exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had. The record of all cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the supreme court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 1,250 pesos, or in which an appeal shall have been taken shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law. Cases forwarded to the supreme court involving sentences less serious than those hereinbefore last mentioned, and not appealed, shall be referred by the clerk to the ministerio fiscal for consideration, and if the latter return the same concurring in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the ministerio fiscal shall not concur in the sentence the case shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law when that officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the court, without the necessity of a further defense or hearing, when that officer recommends a lighter sentence.

(F) No. 136. An act providing for the organization of courts in the Philippine Islands.

* * * * *

SEC. 2. The judicial power of the government of the Philippine Islands shall be vested in a supreme court,

courts of first instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record.

* * * * *

SEC. 16. The jurisdiction of the supreme court shall be of two kinds:

1. Original; and
2. Appellate.

SEC. 17. The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

SEC. 18. The supreme court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the supreme court.

SEC. 19. The supreme court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

* * * * *

SEC. 39. The existing audiencia or supreme court is hereby abolished, and the supreme court provided by this act is substituted in place thereof.

* * * * *

SEC. 55. The jurisdiction of courts of first instance shall be of two kinds:

1. Original; and
2. Appellate.

SEC. 56. Courts of first instance shall have original jurisdiction. * * * 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * *

SEC. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

SEC. 66. There shall be courts of justice of the peace as in this section provided:

1. The existing courts of justices of the peace, established by military orders since the thirteenth day of August, eighteen hundred and ninety-eight, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the Commission.

2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justices of the peace shall be established in every municipality thereof which shall be organized under the Municipal Code, or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of the Municipal Code.

* * * * *

SEC. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offenses arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of one hundred dollars; * * *

(G) No. 194. An act conferring jurisdiction on justices of the peace, etc.

SEC. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance. * * *

SEC. 4. So much of section fifty of said General Order number fifty-eight as requires courts of first instance, or clerks thereof, to forward to the supreme court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such court of first instance, is hereby repealed, and it shall not be necessary to forward to the supreme court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the supreme court for investigation and judgment, as law and justice shall dictate.

(H) The "Spooner Resolution," act of March 2, 1901.

All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons, and shall be

exercised in such manner as the President of the United States shall direct for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion. * * *

Until a permanent government shall have been established in said archipelago full reports shall be made to Congress on or before the first day of each regular session of all legislative acts and proceedings of the temporary government instituted under the provisions hereof; and full reports of the acts and doings of said government, and as to the condition of the archipelago and of its people, shall be made to the President, including all information which may be useful to the Congress in providing for a more permanent government. * * *

(1) Act of Congress of July 1, 1902, "temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive order dated June

twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled "An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

Future appointments of civil governor, vice-governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

* * * * *

SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

That no person shall be held to answer for a criminal offense without due process of law; and no person for

the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.

That no ex post facto law or bill of attainder shall be enacted.

That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign State.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people

peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and whorship, without discrimination or preference, shall forever be allowed.

That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

That the rule of taxation in said islands shall be uniform.

That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

* * * * *

SEC. 9. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the supreme court shall hereafter be

appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the Commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the supreme court and courts of first instance shall not be changed except by act of Congress.

SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controvery exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States.

(J) Section 1891, Revised Statutes.

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

(K) An act to establish trial by jury in Porto Rico.

Be it enacted by the legislative assembly of Porto Rico:

SECTION 1. The right of trial by jury is hereby established in Porto Rico, and the district courts are hereby vested with jurisdiction to grant trial by jury.

SEC. 2. If any person is charged with a crime by a prosecuting attorney or by a grand jury, the punishment for which is capital punishment or two years or more confinement in any penal institution of the island, he may demand a trial by jury only in the district court having jurisdiction, and it shall be granted him under the following provisions:

SEC. 3. Any person so charged, shall, if he elect to have a jury, announce such election to the court, through his counsel, or by his own statement; such election shall be made at least two days before the day set for the trial for the crime with which he is charged; and if not made before that time, he shall be deemed to have waived the right to trial by jury, in which case he shall be tried by the court.

* * * * *

Approved, January 12, 1901.

(L) Extracts from the report of the Attorney-General of Porto Rico to the Attorney-General of the United States, dated November 10, 1901.

Although the jury system in criminal cases has been in force in Spain for thirty years or more, the right of

a trial by jury was never granted to the province of Porto Rico.

The first act passed by the first legislative assembly that ever sat in this island to represent its people was an act establishing the right of trial by jury in any criminal case involving capital punishment or confinement for two years or more in a penal institution.

It is not peremptory, but the act confers that privilege upon the accused; he may elect at any time within two days before the case is set for trial whether he shall be tried by a jury or by the court.

* * * Up to the date of this report, however, there has been no trial by jury in a criminal case in the history of the island, so far as I am advised Although the law has been in force now for nearly seven months, there have been but ten demands for trial by jury. This is doubtless due to several causes. In the first place there is a natural disinclination on the part of the judges and of the lawyers to enter upon a system so radically new. * * *

Varying opinions have been expressed as to the outcome of the experiment. Some of the wisest lawyers and most experienced judges are looking forward with some apprehension to the result. It has been said to me by prominent citizens of the island that the people are not yet educated enough in the practice of self-government to understand and appreciate the dignity of participating in this way in the administration of justice. (Vol. 1, Opp. Atty. Gen. of Porto Rico, pp. 246, 247.)

Report to the Governor of Porto Rico, dated August 1, 1902.

The first statute enacted by the legislative assembly of Porto Rico at its first session established the

right of the accused to demand a trial by jury in cases involving a punishment for a period of two years or more. * * * Although a change in the criminal law so radical as this attracted much attention and was the subject of much comment by the press of the island, it was some months before any defendant accused of crime availed himself of the right to have a jury of his peers pass upon the question of his guilt. And, although the act has been in operation for nearly a year and a half, there has been no demand for such a trial by any defendant charged with crime in the district court of San Juan, the most important trial court of the island. In the other four trial courts there have been in the aggregate but twenty-four jury trials to this date. I do not feel, therefore, that the law has been sufficiently tested to enable me to form any judgment as to whether the enactment was premature and as to whether the right to demand a jury trial will be an efficient aid in the administration of the criminal laws. * * *

It is to be said for the system of submitting the issues in a criminal case to three trained jurists, heretofore and now prevailing when the person accused does not demand a trial by jury, that a judgment of guilty is almost certain to be in accordance with the facts. I have been impressed with this from the examination of the applications to you for pardon. * * * It is very seldom that such an application fails to contain in some form an admission of guilt by the petitioner, and when the claim of innocence is made a study of the case rarely fails to reveal the fact that it is of a frivolous nature and without foundation. Guilty men may occasionally escape just punishment in Porto Rico, but I have been compelled to the conclusion that the punishment of innocent men by a court of three

judges has rarely happened since the establishment of civil government in the islands. (Id., 256, 257.)

Report to the Attorney-General of the United States, dated November 1, 1902.

Although during the year ending on September 30, 1902, the district courts of the island disposed of 3,183 criminal matters of all kinds, in a large number of which the persons accused had the right under the law to demand a jury trial, but 17 such trials were heard. * * * But lately there has been manifested in the jurisdiction of the district court of Mayaguez a growing desire on the part of persons charged with crime and on the part of their attorneys to make use of the privilege thus accorded by law. This is indicated by the fact that in that court during the month of October following the period of one year covered by this report 30 jury cases were heard. This exceeds the entire number of such trials throughout the island in all the courts since the jury-procedure act went into effect. Of the 30 trials only 11 resulted in convictions. And in the total number of 47 jury cases tried since the jury-procedure act went into effect there have been but 18 verdicts of guilty. The details as to the nature of the cases and the evidence adduced are wanting, but the percentage of acquittals is large and is suggestive as the possible explanation of the sudden popularity of the jury-procedure act in that jurisdiction. But I see no just occasion for apprehension at this time. The number of trials is so small as, in my judgment, not to constitute a sufficient test of the efficacy of the jury system as an instrument of justice in this island. (Id., 271, 272.)

Report to the governor of Porto Rico, dated October 1, 1903 (Third Annual Report of the Governor of Porto Rico, pp. 80–83).

It is useless to disguise the fact that results following the adoption of the jury system have been very disappointing to its friends in Porto Rico. * * * On this island the people were not ready for the jury system; many do not care for it. * * *

The obstacle to an immediately successful application of the jury system lies in the political training of the people. * * *

The change is not yet understood; and besides, people are slow to abandon well-established customs for those with which they are not familiar.

It is urged by some that the lawyers themselves are the most serious obstacles in the way of jury trials; that, being familiar with the old code, and acquainted with the practice under it, and not having had any experience in trying cases before a jury, they prefer to adhere to the familiar methods, and hence discourage jury trials except for political offenses. It is even contended that the old judges reach for the code with which they are so familiar when emergencies arise. * * *

But while the advent of the jury system was premature, yet, as far as any act of Porto Rico is concerned, in my judgment it has come to stay. I would not advocate its withdrawal without further trial. Upon the whole I think jury trials are increasing. Sixty cases were set for trial at the Mayaguez September term. But at Ponce out of 107 felony cases since July 1, 1903, only 9 called for a jury. It is now limited to the trial of criminal cases in which the offense charged is a felony, and in no case may the right be invoked in a civil cause.

(M) Criminal proceedings in the Philippines under Spanish law.

[See Exhibits A, B, C, D, and E for provisions of Roman, French, and Spanish law as to jeopardy.]

The following laws contain important provisions relating to criminal proceedings in the Philippines:

> The reglamento for the administration of justice, September 26, 1835: Spanish text, Zamora, IV, 102; Alcubilla, VII, 513; not translated.
>
> The royal cedula of January 30, 1855: Spanish text, Berriz, 1888, I, 804; not translated.
>
> The provisional law of criminal procedure, extended to the Philippines by royal decree of September 4, 1884, carried into effect by royal order of December 17, 1886: Spanish text of law, Berriz, 1888, I, 1182; of decree and order, Alcubilla, II, 1017; not translated.
>
> The compilation of organic provisions for the administration of justice in the Spanish colonies, January 5, 1891: Spanish text, Berriz, 1891, p. 383; translated in War Department.

The reglamento of 1835 bears internal evidence that it extended to the Philippines. For example, in articles 26 and 29 it is provided that certain fines shall be doubled in the colonies; and article 61, which provides for the division of audiencias or superior courts into civil and criminal branches, mentions specifically the audiencias of Cuba, Porto Rico, and the Philippines. Moreover, this reglamento is included in Señor Zamora's "Library of Colonial Law," which received the official sanction of the Spanish crown in 1847. (See Zamora, VI.)

Señor Alcubilla speaks of the reglamento as the ancient organic law of Spanish courts and procedure.

The most important provisions of this organic law, so far as it concerns criminal procedure, are in substance as follows:

Article 31 provides that the alcalde, or mayor, in each town shall, concurrently with the judge of first instance, if there be one in the town, have jurisdiction to try in oral trial petty offenses (*faltas livianas*) which involve no punishment except censure or slight correction.

Article 36 provides that the judges of first instance who are lawyers (letrados) shall have exclusive jurisdiction in their respective districts to hear in first instance all criminal causes belonging to the ordinary jurisdiction (i. e., not ecclesiastical or military).

Article 51 prescribes the procedure in criminal cases in the court of first instance, and consists of fifteen paragraphs.

Paragraph 1 contains an admonition to the judges not to deprive the accused of any protection or privilege which the law allows.

Paragraphs 2 and 3 provide for the "sumario," or preliminary investigation, which shall include the taking of evidence as to the *corpus delicti* and the connection of the accused therewith.

Paragraph 4 provides that at any stage when the innocence of the accused becomes apparent the proceedings shall be quashed, but that the order of quashal shall always be sent up to the audiencia for review (*en consulta*).

Paragraphs 5 to 13 provide for the proceedings in the "plenario" or trial proper, including the written pleadings of both parties, the review of the evidence introduced in the sumario, if contested, the introduction of new evidence, the making up of the record, and the pronouncing of judgment by the court.

Paragraph 14 is as follows:

> Notice of the final judgment shall be given to the parties immediately, and, *whether they appeal or not*, the original record shall be at once sent up to the audiencia of the province, after citation and summons of the parties, provided the cause be for a crime for which the law prescribes a corporal penalty. If the cause be for a petty crime, for which the law does not impose a penalty of this class, the record shall only be sent up to the audiencia, with equal formality, when *any one of the parties* interposes an appeal within two days after notice of the judgment; if an appeal is not taken within said time execution shall issue and the judgment shall be duly carried into effect by the judge.

(See Exhibit F for Spanish text and note.)

The succeeding chapter of the law relates to audiencias, and article 58 provides that the audiencias shall have jurisdiction

> To hear in second instance, and also in third when the law permits, the civil and criminal causes which the judges of first instance of their district send up on appeal or for review (in *consulta*) in accordance with the fourth and fourteenth paragraphs of article 51. (See above.)

Article 72 prescribes the procedure upon appeal or consulta, which includes an oral argument by the fiscal and the attorneys for the accused. This hearing is called the "*vista*." If the decision upon the vista is identical with that in first instance, no further hearing can be had; but if there is a difference in any particular, there might be a third hearing or "*revista*." (This *revista* was afterwards abolished. See below.)

Article 75 provides that at least five judges must sit in second and third instance (vista and revista) in cases of crimes punished by corporal punishment, and that

three must agree in every particular in order to pronounce judgment.

Article 86 provides that when the audiencia are in doubt as to the law of a case, they may apply to the supreme court at Madrid for advice.

The royal cedula of 1855 was framed expressly for Cuba, Porto Rico, and the Philippines (article 246), and, so far as inconsistent with the provisions of the reglamento of 1835, it superseded them (article 247). No change of importance was made, however, in regard to the hearing of criminal causes in first instance (article 20), and since there is nothing in the cedula to take the place of the fourteenth paragraph of article 51 of the reglamento, and nothing inconsistent therewith, the provisions of said paragraph must be regarded as continuing in force. Article 51 of the cedula (paragraph 8) provides that audiencias shall have jurisdiction to hear in second instance civil and criminal cases which the judges of first instance send up on appeal or in *consulta*, thus indicating that criminal causes still went up, as of course, according to the law of 1835.

Señor Ocaña, in his introductory note to the compilation of 1891, page 6, states that the cedula of 1855 ceased to be in force, first in Cuba and Porto Rico and afterwards in the Philippines. This statement is not strictly accurate. In 1879 the Penal Code of Spain and a provisional law for its application were extended to Cuba and Porto Rico, and in 1886 like action was taken with regard to the Philippines But, while these provisional laws covered much of the same ground as the cedula of 1855, they did not repeal that law except in so far as they were inconsistent therewith. Article 95 of the provisional law for the Philippines expressly provides that the laws and orders as to procedure, then

in force in the Philippines, should be repealed only so far as inconsistent with the provisions of said law of 1886.

It is certain that the cedula of 1850 was in force at the time this provisional law of 1886 was promulgated. (See Alcubilla, V, 247.)

The reglamento of 1835 and the cedula of 1855, therefore, continued in force after 1886, except so far as they were inconsistent with the Provisional Law of 1886. And this is a particularly important fact in view of the incompleteness of said law of 1886.

This law consists of ninety-five articles. Articles 1 to 26 provide for the trial of misdemeanors (*faltas*) by justices of the peace, with right of appeal to the court of first instance; articles 27 to 30 define the right to arrest for crime; article 31 provides that within twenty-four hours after a person has been arrested and brought before a court of first instance he must be either committed or discharged; articles 32 to 45 relate to commitment, bail, and treatment of prisoners; article 46 provides that the accused shall be released from custody when his innocence becomes manifest; article 47 provides that orders of commitment (*autos de prision*) shall be appealable to the superior court.

At this point we might expect to find a repetition or amendment of the law as to the trial in the court of first instance and the appeal or certification in *consulta* to the audiencia, but the Provisional Law is silent upon this subject. Article 48 goes on to say that one of the judges of the audiencia shall, in every case, serve as "ponente" (to receive the report of the "relator," or officer who investigates the law, compare said report with the record, and lay the case before the other judges); article 49 limits the cases in which five judges are required to sit (see article 75 of the Reglamento of 1835); article 50 declares that judgment must be pro-

nounced within five days after the *vista;* article 51 prescribes the form in which judgment must be rendered; article 52 prescribes the different kinds of proof which are sufficient to support a judgment of guilty; article 53 provides that from interlocutory orders of the audiencias a petition for a rehearing shall lie, but from final judgments there shall be no appeal except in cassation to the supreme court at Madrid.

This is the most important change made by the Provisional Law. The laws of 1835 and 1855 both permitted a "*suplica*" or petition for rehearing from the judgment in second instance, and there was no appeal in cassation in criminal causes. (See art. 198, Ced., 1855.) Under the Provisional Law the judgment in second instance became final, subject only to the appeal in cassation, similar to a writ of error.

Articles 54 to 79 of the Provisional Law treat of the appeal in cassation, and according to article 63 this appeal might be taken by the prosecution as well as by the defense. Articles 80–94 relate to certain temporary proceedings, costs, and rules of interpretation. The last article (95) repeals the laws or orders concerning procedure in force in the Philippines at that time, so far as inconsistent with the provisions of the Provisional Law, and provides that the laws of procedure in force in the Peninsula shall accompany this law and be applied in a supplementary character as doctrine worthy to be considered.

It is apparent therefore that this provisional law of procedure was merely an amendment to the existing laws, designed to meet the exigencies of a new substantive law of crimes, the Penal Code; that it did not purport to be a comprehensive code of procedure, and that the fundamental provisions in regard to the

trial of causes in first and second instance remained unchanged.

This fact is illustrated by the comment of Señor Ocaña as to the change in procedure in Cuba and Porto Rico in 1888. He says:

> The important royal decree of October 26, 1888, the main object of which was the organization of the courts of Cuba and Puerto Rico for the cognizance of criminal causes in oral and public trial and in single instance, introduced conspicuous changes in the organization of the courts of our Antilles. * * * This most important reform, inspired by a commendable intention to extend to the colonial provinces the oral and public trial with single instance before a collegiate court, different from the secret examination system * * * could not have been extended to the Philippines, because the backwardness of culture in these islands, the difference in language of their inhabitants, their lack of clear notions concerning public duties and those of citizenship, rendered impossible for the present the application of a system based on publicity of evidence and liability manfully accepted and understood beforehand, coupled with the duty to assist the administration of justice at any cost and without restrictions.

Speaking of the Compilation of 1891, to which his remarks are a preface, Señor Ocaña further says:

> The *promotores fiscales* (public prosecutors in the lower courts) and the present organization of the courts of first instance and of the justices of the peace in the Philippines are retained, as oral trial and the single instance for criminal matters, now in force in Spain, Cuba, and Porto Rico, could not as yet be extended to those islands, for reasons apparent to all.

Turning to the law of criminal procedure of Cuba and Porto Rico (Alcubilla, V, 66, 245) and the royal decree of October 26, 1888, reorganizing the courts of those islands (Berriz, 1888, I, 1201), we find that under the system of oral and public trials in single instance the function of the judge of first instance in criminal trials became that of a judge of "*instrucción*" (*juge d'instruction*), or merely an examining magistrate, whose duties ceased with the *sumario*. (See article 622 of the code and article 10 of the decree.)

This accounts for the provisions in articles 185 and 186 of the compilation of 1891, that judges of "*instruccion*" and first instance "shall have the power * * * in criminal matters, to conduct the *sumarios* in the causes and to institute the other proceedings referred to them by audiencias," and that criminal chambers and audiencias shall have jurisdiction to try "all the causes for crimes committed within their respective provinces." This language is plainly compatible only with the proceedings under the new law of procedure, and can have no reference to the Philippines. This is made clearer by article 22 of the compilation, which provides that—

> the actual organization of inferior courts of first instance and of courts of justices of the peace in the Philippine Islands shall be preserved until the law of criminal procedure in force in the peninsula and in the islands of Cuba and Puerto Rico is extended to the Philippines.

The law of 1891 was merely a compilation of existing laws applicable to the colonies, and the provision that judges of first instance, in general, should have power to conduct the *sumario* in criminal causes did not operate to deprive those judges in the Philippines of their jurisdiction to try a case, both in *sumario* and *plenario*, to judgment.

It appears from the foregoing that at the time of the American occupation of the Philippines the trial of serious crimes consisted of two stages—the hearing in first instance, and the "*vista*," or review, in second instance;

That the hearing in first instance, consisting of the "*sumario*" and "*plenario*," was held before the judge of first instance, who pronounced judgment in the case;

That *in every case* involving a serious crime, the record and judgment went up to the superior court or audiencia as a matter of course, in *consulta;*

That the audiencia conducted the *vista* or rehearing, and pronounced final judgment, upon which execution issued and from which there was no recourse except that of cassation.

That the appeal in cassation for matter of law lay to the supreme court at Madrid, and was allowed to the state as well as to the defense.

EXHIBIT A.

Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest. Si tamen ex eodem facto plurima crimina nascuntur, et de uno crimine in accusationem fuerit deductus, de altero non prohibetur ab alio deferri. (Cod. lib. ix, tit. ii, 1, 9.)

EXHIBIT B.

Toute personne acquittée legalement ne pourra plus être reprise ni accusée à raison du même fait. (Code d'inst. crim., art. 360.)

EXHIBIT C.

Despues que algun home acusado de algun mal fecho fuere dado por quito por Juicio, ninguno no le pueda despues acusar de aquel fecho mesmo. (Fuero Real, lib. iv, tit. xxi, 1, 13.)

EXHIBIT D.

Quito seyendo algunt home por sentencia valedera de algunt yerro sobre que lo hobiesen acusado, dende adelante non lo podrie otro ninguno acusar sobre aquel yerro. (Siete Partidas, Part. III, tit. 1, ley 12.)

EXHIBIT E.

Es otra de las escepciones generales, que no pueda ser acusado el que habiéndolo sido por el mismo delito, fué juzgado por él; por cuanto el efecto mas esencial de todas las declaraciones judiciales ejecutoriadas es, constituir un derecho inalterable. (Arrazola, tomo 1, pag. 511.)

EXHIBIT F.

La sentencia definitiva será notificada á estas (partes) inmediatamente, ó apelen ó no, se remitirán desde luego los autos originales á la audiencia del territorio con previa citación y emplazamiento de las mismas, siempre que la causa fuere sobre delito á que por la ley esté señalada pena corporal. Si la causa fuere sobre delito liviano á que por la ley no se imponga pena de esta clase, sólo se remitirá á la audiencia con igual formalidad cuando alguna de las partes interponga apelación dentro de los dos días siguientes al de la notificación de la sentencia; la cual causará ejecutoria, y será llevada desde luego á debido efecto por el juez, si no se apelare en dicho término. (Reglamento, 1835, art. 51, para. 14.)

NOTE.—"Sentencia" does not mean sentence, but judgment, or, as Don Vicente Salvá defines it in his dictionary, "the declaration of the judgment and decision of the judge upon the merits of the case." It would thus include a judgment of acquittal as well as

of conviction. The provision above quoted is illustrated by article 852 of the Compilation of Criminal Procedure of 1879 (Berris, app., vol. 1 and 2, p. 193), which superseded the Reglamento of 1835 in the Peninsula, but was never extended to the colonies. The provision mentioned, following after various rules as to pronouncing judgment in the court of first instance, declares that—

> *In all cases* the judge shall order the cause to be certified to the audiencia in consulta, and the parties to be cited and summoned, in order that they may make use of their right (to appear in the audiencia) within the time allotted them.

(**N.**) [Note *d*, p. 10 of Brief.]

The *reglamento* of September 26, 1835, speaks in terms of the Philippines and other Spanish colonies, and is included in Zamora's officially approved collection of laws applicable to the colonies. Many of the provisions of the *reglamento* have been superseded by subsequent laws, but the *reglamento* itself has never been repealed, and its provisions as to the course of appeal in criminal cases constituted the law in force upon that subject at the time of the American occupation (Opinion of Chief Justice Arellano and Solicitor-General Araneta, cablegram of March 20, 1904, *infra*). The *cedula* of 1855, the provisional law of 1884, and the compilation of 1891 were in terms applicable to the colonies. Each of these laws contains a provision that prior laws shall be repealed only so far as inconsistent with the later enactment.

(O) Translation of cablegram received from Philippine government at 8.43 a. m., March 20, 1904.

SECRETARY OF WAR, *Washington:*

With reference to your telegram of 15th, Araneta and Arellano agree that article 51, Reglamento, September 26, 1835, in force here at the date of American occupation. See pages 11, 28, and 34, volume 6, San Pedro's Legislación Ultramarina.

Article 58 of said Reglamento gives audiencia power to try second and third instance civil and criminal cases sent from courts of the first instance on appeal or for consultation. This is further authorized by No. 8, of article 51 of Royal Order of January 30, 1855.

All these provisions in force here at the time of American occupation from paragraph 14, article 51, and from article 58 of said Reglamento and from No. 8, article 51, order of January 30, 1855. Prosecuting attorney was one of the parties to a public criminal action and could appeal from judgment of acquittal. Such appeal was always allowed. Article 166, Royal Order January 30, 1855, expressly authorized such appeal.

WRIGHT.

(P) General Orders, Office of the United States military governor in the Philippine Islands.

General Orders, No. 20, Manila, P. I., May 29, 1899.

* * * * *

II. The supreme court of the Philippine Islands (audiencia territorial), heretofore administered in the city of Manila, the exercise of whose jurisdiction has been suspended as to criminal affairs since August 13, 1898, and as to civil affairs since January 30, 1899, is hereby reestablished, and will exercise the jurisdiction,

civil and criminal, which it possessed prior to August 13, 1898, in so far as compatible with the supremacy of the United States in said islands, and will administer the laws recognized as continuing in force by proclamation from these headquarters dated August 14, 1898, except in so far as they have been, or may hereafter be, modified by authority of the United States.

* * * * *

General Orders, No. 21. Manila, P. I., June 5, 1899.

The courts of first instance of the province of Manila, and the courts of the peace, heretofore held in the city of Manila, P. I., are hereby reestablished and will exercise the jurisdiction, civil and criminal, possessed by them prior to August 13, 1898, in so far as compatible with the supremacy of the United States in the Philippine Islands and the exercise of military government therein, and will administer the laws recognized as continuing in force by proclamation from these headquarters dated August 14, 1898, except in so far as these laws have been, or hereafter may be, modified by authority of the United States.

* * * * *

General Orders, No. 22. Manila, P. I., June 17, 1899.

I. The supreme court of the Phillippine Islands and the courts of first instance and of the peace for the province of Manila, reestablished in General Orders, Nos. 20 and 21, c. s., this office, are announced as open and in the exercise of their jurisdiction, civil and criminal, on and after Wednesday, June 21, 1899. * * *

(Q) Extract from debates in Congress on the Philippine civil government bill (Congressional Record, Fifty-seventh Congress, first session, p. 6082).

Mr. PETTUS. I desire to ask the Senator in charge of the bill if it would not be better to put into that amendment a provision securing the right of trial by jury.

Mr. LODGE. That amendment embodies the instructions to the Commission issued by President McKinley, and which are confirmed by the bill as it stands. The committee thought it better to put them in explicitly in words.

The right to bear arms and the right of trial by jury were omitted deliberately by the committee—the right to bear arms, owing to the disturbed condition that exists in the islands, and the right of trial by jury, because the committee were satisfied, on the testimony of Governor Taft and others, that the time had not yet come to compel the Commission to grant that. They have gone so far as to provide for what is known as assessors to sit with the judges. Governor Taft thought it was unwise, and he satisfied the majority of the committee of the fact that it was unwise to go further at this time. Those two provisions were omitted from President McKinley's instructions, and the majority of the committee thought it best not to embody them with the rest of the bill of rights.

[MEM.—It seems proper to refer to these debates, because no one doubts that Congress did not extend the jury guarantees, and the debates merely serve to show for what reasons those guarantees were withheld.]

O